IN THE MATTER OF ARBITRATION BETWEEN

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Anoka-Hennepin Independent
School District #11,

Employer,

DECISION AND AWARD

and

BMS CASE NO. 06-PA-1220

Anoka-Hennepin Education
Minnesota,

Union.
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ARBITRATOR:	Stephen A. Bard
DATE OF HEARING:	December 6, 2006
PLACE OF HEARING:	District Offices, Anoka, Minnesota
DATE OF MAILING POST-HEARING BRIEFS:	January 16, 2007
DATE OF DECISION AND AWARD:	February 12, 2007
GRIEVANTS:	Michael Watson, Andy Richter, and Nancy Stutzman

APPEARANCES:

For the Employer:

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For the Union:

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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on December 6, 2006, at 9:00 a.m. in the offices of Independent School District #11 in Anoka, Minnesota. The Employer was present with its witnesses and was represented by Mr. Paul Cady. The Union was present with its witnesses and was represented by Mr. David Kundin. .

The parties stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the Arbitrator for a decision on the merits. Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on January 16, 2007.

ISSUE

1. Did the Employer violate the Collective Bargaining Agreement when it refused and/or failed to pay the grievants for more than one extra service agreement ("ESA") when they performed more than one extra-curricular assignment?

2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE IV – TEACHER RIGHTS

Section 8. Teacher participation in extracurricular and other duties scheduled after normal duty hours shall be voluntary. Accommodation for open house attendance shall be made on an individual building basis. Teachers wishing to cease participating in duties for which compensation is received shall notify the Principal by April 1, so that the teacher shall be relieved of such duties for the following year.

APPENDIX B

The following shall be the extracurricular Salary Schedule for the 2005-07 school years.

Section A. SENIOR HIGH SCHOOL Extracurricular Athletics and Activities

	2005-06	2006-07
Subd. 5. Music		
Fall Marching Band	4,893	4,990
Asst. Band if Assigned	3,000	3,060
Summer Marching Band **Director**	**350/event up to 33,500 max**	
Summer Marching Band Assistant	**200/event up to 2,000 max**	
Band Director	4,049	4,130
Orchestra Director	4,049	4,130
Choir Director	4,049	4,130
Pep Band Director	**200/event up to max of 2,400**	

1. All full time get rate.
2. All part time get proportion of rate.
3. **Performance Incentive: for athletic teams that advance to a state tournament, the coach and assistant coach shall receive an additional $100 bonus; music band directors and assistants who perform at these events shall also be eligible for the bonus.**

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. Anoka-Hennepin Independent School District No. 11 (hereinafter referred to as ("District") employs approximately eight thousand (8,000) employees including two thousand nine hundred (2,900) teachers represented by the Anoka-Hennepin Education Minnesota (hereinafter referred to as "Union") to serve over 40,000 students.

2. The District has five traditional grade 9-12 high schools, (Andover HS, Anoka HS, Blaine HS, Champlin Park HS and Coon Rapids HS), and each one offers its students classes in band, orchestra and chorus. Each high school has a music department lead position, which is basically equivalent to a music department chairperson.

3. The terms and conditions for employment of teachers is set forth in the July 1, 2005

through June 30, 2007 collective bargaining agreement ("CBA"). The extra curricular salary schedule for band, orchestra, and choir directors in the high school music program is set forth in Appendix B, Section A, subd. 5. The contract provides that the music directors receive $4,049 for the 2005-2006 school year and $4,130 for the 2006-07 school year. The contract language then provides:

"1. All full-time get rate.
2. All part-time get proportion of rate."

Band, orchestra and chorus directors at the high schools are paid these extra amounts, according to Appendix B, for the after-school activities that are part of the curriculum for these three classes, since these activities are required of the high school students who sign up for these classes. Such activities include seasonal concerts, participation in activities such as Solo & Ensemble Competitions and Band, Orchestral or Choir Festivals and competitions in programs from other high schools in the area.

4. There were significant increases in compensation levels for these high school music ESAs that were negotiated between the parties as part of the 2005-07 Master Agreement. Negotiations were not concluded until December of 2005, but pay changes were made retroactive to the beginning of the 2005-06 school year. Band director pay went up over 40%, from $2,888 in 2004-05, to $4,049 for 2005-06. Orchestra and choir directors pay increased even more, by 187%, from $1,407 in 2004-05 to $4,049 for 2005-06. These negotiated increases more than doubled the pay for orchestra and choir directors, and equalized their pay with band directors pay as well.

5. The District's high school music budget allocates one ESA per full-time equivalent (FTE).

6. The process for execution and payment of an ESA for an individual teacher commences with the athletic/activities secretary who completes the ESA and then arranges for the teacher's signature and forwards the ESA on for approval by the principal or assistant principal/activities director. The agreement is then forwarded to the Finance department of the District which enters the data into an electronic spreadsheet and forwards the spreadsheet to both the Employee Services and Payroll departments. The Employee Services Department places the matter on the School Board agenda for approval, and then, following approval, the Payroll Department processes the payment on either a per pay day basis or lump sum at the end of the year as designated on the ESA by the teacher.

7. Until 2002 the four high schools in the District were of fairly equal size with approximately 2,800-3,200 students in each school. As such, as a general rule, teachers taught full-time in one discipline and in one high school, and the high schools did not share teachers. However, in 2002, in order to provide enrollment relief at the secondary levels, the District opened Andover High School with an enrollment of approximately 1,400 students. At that time, a decision was made at the Superintendent Cabinet level to maintain the same curriculum and ESA opportunities for at least the first three years at Andover High School. Therefore, for ESA allocation purposes, it was requested and approved for Andover High School only, that the District would allocate one music ESA per discipline even if there was less than one teaching full-time equivalent. For example, one full-time stipend for an orchestra ESA was allocated even though it might only have a part-time orchestra teaching assignment. This so-called "Andover Exception" was never communicated to the Union or any of the grievants.

8. On December 20, 2005, following negotiations, Ms. Linda Fenwick, Labor Relations and Benefits Manager for the District, convened a meeting with staff from the Financing/Accounting, Payroll, Employee Services and Labor Relations departments to discuss the settlement and ESA process and, in particular, the music programs. The District claimed it was aware that "inconsistencies and/or mistakes existed in the past regarding the processing and payment of ESAs", but it was not aware of the extent of the inconsistencies. As a result of this meeting, the District developed a new process which required finance and payroll staff to look at the staffing assignments of employees for purposes of establishing checks and balances. As was the case with the "Andover Exception", neither the new process nor the fact that the District deemed certain past practices in regard to payment for ESAs to have been the result of "mistakes" was communicated either to the Union or any affected teacher of music in the District.

9. Nancy Stutzman has taught music in the District since 1981, and she has taught both choir and orchestra at the middle and high school level. For the 1999-2000 school year, she was assigned to teach both subjects at Coon Rapids HS, but she was told that she would only be paid for one ESA. She filed a grievance with the District through the Union and that grievance was sustained by the District. The result of that grievance was that Nancy Stutzman was paid for two separate ESAs for the rest of the time she was at Coon Rapids HS. In addition, she was paid for two separate ESAs when she moved to the newly built Andover HS beginning in the fall of 2002. The reason she was paid for two ESAs at Andover HS, was that she taught and directed both orchestra and chorus at Andover HS. In 2005-06, she agreed to a change in her schedule so she taught orchestra at Andover HS and also traveled to

Anoka HS to teach orchestra there as well. Since she was now directing orchestras in two separate buildings, she expected to receive two ESAs. In fact, in the fall of 2005, she did receive ESA contracts for two full ESAs for these assignments. For 2005-06, and 2006-07, Nancy Stutzman's teaching assignment was 2/3 orchestra at Andover HS, and 1/3 orchestra at Anoka HS.

10. In 2005-2006, Grievant Michael Watson was a full-time music teacher assigned to teach two thirds (.67) orchestra at Coon Rapids High School and one third (.33) band at Coon Rapids High School. Grievant Watson received one ESA. It should be noted that although Grievant Watson was paid a 1.0 full-time orchestra ESA, it should have been allocated as two thirds orchestra and one third band.

11. In 2005-2006, Grievant Andy Richter was a full-time music teacher assigned to teach one third (.33) band at Anoka High School and one third (.33) band at Coon Rapids High School. At the arbitration hearing, it was also noted that in order to maintain a full-time continuing contract teaching assignment, Grievant Richter also assisted Anoka High School orchestra one third time even though he did not teach. Grievant Richter received 1.0 ESA at Anoka and .33 ESA at Coon Rapids High School.

12. In March 2006, the Union filed a grievance on behalf of Andy Richter and Michael Watson contending that each should receive two full-time ESAs. The District denied the grievance.

13. In July 2006, the Union filed a grievance on behalf of Nancy Stutzman claiming that notwithstanding that she only teaches part-time assignments at each school, because she had received two full-time ESAs in previous years and attends evening concerts at both high

schools, she should continue to receive two full-time ESAs. The District denied the grievance.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. THE FACTS IN THE ORIGINAL STUTZMAN GRIEVANCE ARE THE SAME AS IN THESE GRIEVANCES, AND THE DECISION TO PAY NANCY STUTZMAN TWO ESAS FOR TWO ASSIGNMENTS WAS A DETERMINATION ON THE MERITS WHICH IS A PRECEDENT BINDING ON THE PARTIES.

While the legal concepts of *res judicata*, collateral estoppel, and *stare decisis,* are not binding on arbitrators, they are important concepts that have merit and deserve consideration in a case such as this one, where the prior decision was a settled one, and now the same parties are in a position to re-litigate the same issue. There is no logical rationale for treating the previous Stutzman grievance as anything other than a final resolution of this matter, since it was the District that sustained the grievance, thus, deciding not to pursue this matter to resolution by an arbitrator at that time.

2. EVEN IF THE STUTZMAN GRIEVANCE IN 2000 DID NOT DECIDE THE ISSUE IN DISPUTE, THIS GRIEVANCE MUST BE SUSTAINED BASED ON THE FACTS IN THIS RECORD AND THE EQUITIES AT ISSUE.

A. The District's interpretation of the language in subsection 5 equating ESAs to FTEs is not consistent with the realities of music ESAs or the contractual provisions in Appendix B.

B. The concept of voluntariness affects the way ESAs should be allotted if fairness and equity are to prevail. Article IV contains a provision that all after school activity assignments are voluntary. It outlines a procedure for those who no longer seek to do ESAs can stop doing so. The District offered its position that the

voluntariness concept does not apply to music ESAs. In fact, no one who testified thought that it did apply. If the voluntary provisions are to be ignored, then the District should not be allowed to place arbitrary restrictions "position controls" on the number of ESAs to assign. The District cannot have it both ways – if the music ESAs are not voluntary, then the District cannot impose arbitrary "position control" restrictions on the number of ESAs allotted.

3. THE LEGAL DOCTRINES OF UNILATERAL MISTAKE AND PAST PRACTICE LIMIT THE DISTRICT'S EFFORTS TO EXPLAIN AWAY ITS "MISTAKES" IN PAYING NANCY STUTZMAN AND OTHERS FOR MULTIPLE ESAS.

A. There are several situations where teachers were paid multiple ESAs, and in each of those circumstances, the District explains that those were all "mistakes". Thus, the District seeks to establish a past practice of paying for only one ESA for band, orchestra, and choir, these "mistakes" notwithstanding. In order for the District to prove that it has established a past practice, there must be consistency over a period of time, and both parties must have been aware of the practice. Linda Fenwick admitted there was no practice in place to even notify or inform teachers of the fact that the agreements they did sign were altered, and reduced, as happened to Nancy Stutzman in 2005-06. Fenwick also admitted that the position control document, that is supposedly part of the rationale for this District practice to control costs, was never even shared with the Union. Clearly, whatever policy the District was implementing was inconsistent, less than clear to the affected employees, lacked mutuality and was not in place for any length of time. Thus, the efforts of the District to establish a past practice of paying only one ESA for one FTE must fail.

B. The legal doctrine of unilateral mistake precludes the District from failing to pay for ESAs that are performed and assigned to band, orchestra and choir directors. Here, the District has paid individuals contrary to the position control requirements, and contrary to the Andover Exception, and contrary to its interpretation of Sentences #1 and #2. It is well-settled law that avoidance for unilateral mistake is only allowed if enforcement of the contract against the mistaken party would be oppressive, or result in an unconscionably unequal exchange of value, and rescission would impose no substantial hardship on the other. Clearly, to require the District to pay for work that it has paid for in the past cannot be deemed oppressive to the District. At the same time, it certainly imposes a substantial hardship on those who work hard at two, or even three ESAs only to receive one payment due to position control requirements that are often ignored, due to "mistakes" or "exceptions" or mistakes in applying the exceptions.

4. THE EQUITIES FAVOR THE UNION POSITION.

A. It is unfair to tell music teachers that they must be paid less for ESA assignments that are not voluntary, due to "position control" restrictions arbitrarily set forth for economic reasons. The fact is that ESAs are pay for assignments or tasks completed, and if a teacher takes on two separate tasks, she should be paid for two ESAs, regardless of what her FTE is.

B How can ESAs equal FTEs, when marching band directors, some who are not even teachers, have zero FTEs are paid full ESAs? The answer is simple. They are

paid to direct the marching band. If someone directs band at one of the high schools, they should get paid the ESA for that duty. To do otherwise, would be unfair, inequitable and wrong.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. THE DISTRICT'S CALCULATION OF EXTRA SERVICE AGREEMENTS IS CONSISTENT WITH BOTH THE EXPRESS LANGUAGE OF APPENDIX B, SECTION A, SUBD. 5, AS WELL AS DISTRICT'S EXTRA SERVICE AGREEMENT STAFFING ALLOCATIONS.

    A. There is no contract violation. Appendix B, Section A, subd. 5 provides: "1. All full-time get rate. 2. All part-time get proportion of rate". The extra service agreement staffing allocation provides that one extra service agreement is allocated per teaching FTE. As such, the express contract language read together with the District's extra service staffing allocation is clear and unambiguous.

    B. Ms. Fenwick testified that although the parties have reviewed and considered alternative methods of compensation several times for purposes of establishing more equitable compensation formulas during past contract negotiations, no changes in the contract language or District calculation as it applies to full-time and part-time rates have been agreed to during negotiations. Other than the Andover exception, the District has never agreed to pay full-time extra service agreements to part-time teachers or for part-time teaching assignments.

2. THE UNION POSITION LEADS TO UNFAIR RESULTS.

    A. The Union's position is inherently inequitable and unfair. For example, each

high school has a different number of concerts within each music discipline. Moreover, within and between each high school, the number of concerts is different for band, orchestra, and choir. Finally, within each music discipline, the numbers of concerts vary between the top "varsity" groups and the junior varsity or tenth/ninth grade group performances. Accordingly, on its face, an agreement to pay the same dollar stipend to each director regardless of teaching assignments is inequitable.

B. To accept the Union's argument leads to unreasonable extra service compensation for a full-time teacher who teaches more than one discipline on a part-time basis. For example, the Union advocates that Ms. Stephanie Peterson, a probationary music teacher with one third of her time teaching band at Anoka High School, one third of her time teaching orchestra at Anoka High School, and one third of her time teaching band at Coon Rapids High School would receive 3 full-time music extra service agreements in 2006-07. If the grievance is sustained; this amounts to $12,390 as opposed to the $4,013 a similarly employed full-time music teacher who teaches one discipline would receive. This is an absurd result.

C. Historically, teachers have not had to teach between music disciplines or have had to travel between buildings. With the opening of Andover High School music teaching assignments changed. If additional or different compensation formula/allocation is warranted for these circumstances, however, then it must be negotiated and not achieved through the grievance arbitration process.

3. A PAST PRACTICE DOES NOT EXIST TO COMPENSATE TEACHERS IN A PART-TIME TEACHING ASSIGNMENT WITH A FULL TIME EXTRA SERVICE AGREEMENT.

A. Despite its burden of proof, the Union was unable to articulate whether it was alleging a past-practice. The contract language and practice requires the District to calculate extra service pay in direct proportion to the teaching assignment. The sole exception to this practice has been the decision regarding Andover High School, as well as District acknowledged mistakes in processing extra service agreements. The Union cannot successfully argue that a past practice exists from previous District mistakes in processing.

4. THE DISTRICT'S UNILATERAL MISTAKE OF PROCESSING EXRA SERVICE AGREEMENTS IS NOT SUFFICIENT FOR ALTERING THE AGREEMENT OR SUSTAINING THE GRIEVANCE.

DISCUSSION

The Meaning of the Contract Language

As in all cases of contract interpretation, the starting point is to attempt to discern the clear meaning of the applicable contract language, if possible, and, if the language is ambiguous or unclear, to apply accepted canons of contract interpretation to attempt to ascertain and give meaning to the intent of the parties. In this case the analysis centers on the meaning of the phrase "part time" in Schedule A, Subdivision 5 (2). The District interprets the contract to mean the ESA payments are allocated to portions of a Full Time Equivalent. The Union wants the Arbitrator to apply the phrase to the extra duties being performed. Cogent arguments have been made in support of each interpretation and, unfortunately, the intent of the parties is simply not clear.

The Union points out with considerable persuasiveness that the language cannot possibly refer to FTEs because, if it did, there would be no contractual basis whatsoever to pay ESA compensation to marching band directors who are not even teachers and, therefore, have no FTEs.

The District does not really have an answer for this argument but counters by pointing out that the Union's position that the ESAs should be paid to compensate for actual time spent by the teacher in performing extra-curricular activities does not work either, since there are significant differences between the time demands placed on teachers in the same discipline because of variance in the numbers of concerts they attend depending on the "grade" of the band or orchestra with which they are involved and other factors.

The true meaning of the parties cannot be ascertained from the dictionary definition of "part time" because the confusion lies not in the phrase itself but, rather, to what it refers. Sometimes in these situations an Arbitrator can look to the conduct of the parties in the past, even when such conduct falls short of a binding past practice, to determine what the parties themselves thought the contract language meant. Unfortunately, that cannot be done in this situation since the District claims its conduct in the past in variance with its interpretation of the contract language was the result either of the "Andover Exception" or simple mistake in administering the contract.

The Arbitrator has concluded that he cannot determine from the contract language or the parties conduct in applying that language what the true intent of the parties was on this point.

The Past Practice Issue

In Ramsey County v. AFSCME, 309 N.W.2d 785 (Minn. 1981) the Minnesota Supreme Court defined the necessary elements of a binding past practice as follows:

> Past practice has been defined as a "prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances." Certain qualities distinguish a binding past

practice from a course of conduct that has no particular evidentiary significance:

(1) clarity and consistency
(2) longevity and repetition
(3) acceptability
(4) a consideration of the underlying circumstance
(5) mutuality

The Union claims that the District has failed to meet its burden of proof in establishing a past practice to pay only one ESA per FTE. The Arbitrator does not understand that the District ever claimed that such a practice existed. On the contrary, the District admitted that it had not consistently followed this practice but explained that the situations in which it deviated from doing so were the result of either the "Andover Exception" or mistake. The District based its main argument on the language of the contract.

The Union, on the other hand, clearly attempted to establish a binding past practice consistent with its interpretation, although it urged that result via the doctrines of *res judicata* or collateral estoppel.

The Arbitrator has examined the evidence carefully and does not believe that the examples that occurred in the past of alleged "overpayment" of ESAs, whether arising from mistake or otherwise, had sufficient longevity, clarity, and mutuality to establish a binding past practice on the parties. This conclusion does not, however, mean that those incidents have no bearing on the outcome of the case.

The Relative Equities

The clear intent of ESAs is to compensate teachers for activities which are not required of them and which take place outside of regular school hours. To some extent it is based on the time demands involved. This would partially explain the difference in the negotiated contract rates for

athletic coaches and music teachers. During basketball season, for example, the basketball coach presumably puts in more time in daily practice and actual games and preparation than does an orchestra leader with concerts. However, the negotiated rates are also clearly not based exclusively on the amount of time spent. Take, for example, a full time physical education teacher who elects to be a full time football coach and an assistant coach for hockey and baseball. Such an individual would have only one FTE but would be busy with sports programs on a daily basis throughout the entire school year. If his duties as an assistant coach in hockey and baseball required his presence at all practices and games, it would seem completely unreasonable to compensate him with only one ESA.

To further complicate the matter, unlike athletic coaches, the participation by music teachers in after school concerts and programs is not voluntary by them as required by Article IV of the CBA. The physical education program requires students to participate in gym but does not require that they try out for an athletic team. Both student athletes and their teacher coaches participate in these team sports voluntarily. In contrast, band, orchestra, and choir members are required as part of the curriculum to participate in "after school" concerts and programs and their teachers are not given a choice not to attend.

In part of its argument the District cited the case of Ms. Stephanie Peterson, a probationary music teacher with one third of her time teaching band at Anoka High School, one third of her time teaching orchestra at Anoka High School, and one third of her time teaching band at Coon Rapids High School. The District argued that under the Union's proposal, she would receive 3 full-time music extra service agreements in 2006-07 if the grievance is sustained; this amounts to $12,390 as opposed to the $4,0130 a similarly employed full-time music teacher who teaches one discipline

would receive. According to the District, "this is absurd and nonsensical." Upon reflection, however, is it really absurd and nonsensical? It may be out of proportion to pay her three times as much as the full time teacher who teaches only one discipline, but it does not seem absurd to this Arbitrator to compensate her with some additional amount if, as seems likely, she spends a great deal more time and effort after school because she is split between disciplines and therefore must prepare and attend more programs and concerts.

In balance, therefore, the Arbitrator feels that the equities favor the Union's arguments. However, as the District properly points out, this is not interest arbitration and the Arbitrator does not have the power to unilaterally alter the contract and give either side something which was not bargained for.

Estoppel

Loosely stated, the legal doctrine of "estoppel" applies where one party's conduct causes another party to rely to its detriment and, accordingly, the first party is barred by its own actions from asserting a certain position to avoid an unjust result. In this complicated situation, the Arbitrator feels that his broad powers to fashion a fair and equitable remedy along with the doctrine of estoppel compel an award in favor of these Grievants for the following reasons.

The District unilaterally altered the written ESAs in favor of its interpretation of the CBA language without ever notifying the teachers that it had done so. Similarly, the so called "Andover Exception" was adopted unilaterally and never communicated to either the effected teachers or the Union. The 1999—2000 Grievance decision in favor of Nancy Stutzman, along with the above noted actions, gave rise to a situation where these grievants had every right to believe that they would be paid the multiple ESAs which they are claiming. In reaching this conclusion, the

Arbitrator is not suggesting that the District did anything intentionally to deceive the teachers involved. On the other hand, the effect of mistake, sloppy administration, poor communication, or a combination of the above had the same effect. It would be manifestly unfair to all of these grievants to deny them the pay which they had every justifiable expectation of receiving because of the negligence of the District.

DECISION AND AWARD

For the above stated reasons the grievance is granted in part and denied in part. The Arbitrator is not interpreting the ambiguous contract language in favor of either party. A resolution of that issue is properly for future bargaining or interest arbitration. This situation should be resolved for future cases by providing for it specifically in the language of the next Collective Bargaining Agreement. However, in the interest of justice and fairness to these grievants, the Arbitrator makes the following award:

1. For the school years of 2005-2006 and 2006-2007, each of these grievants shall be paid one full ESA for each full extra-curricular duty assignment they fulfill. As an example, if a teacher splits his or her time equally teaching orchestra at two different schools, or spends all of his or her time at the same school but splits his time equally between band and orchestra, and attends all of the concerts and performances at both buildings or for both groups, he or she shall receive two full ESAs. If a teacher only has part of the ESA duties for a discipline (such as a band "assistant") he or she shall receive a pro-rated portion of an ESA for that function.

2. Because the Arbitrator has significant doubt about the true intent of the parties and the proper interpretation of the contract language, this decision shall not be precedent for future cases or be considered a binding interpretation of the disputed contract language in favor of the Union. That decision is reserved for future bargaining or interest arbitration.

Respectfully Submitted

Stephen A. Bard, Arbitrator